

STATE OF MICHIGAN
COURT OF APPEALS

MAYO SOSINSKI and LEONARD SOSINSKI,

Plaintiffs-Appellants,

v

CYNTHIA M. TROSIN, D.O., P.C., CYNTHIA
M. TROSIN, D.O. and MYRON R. EMERICK,
D.O.,

Defendants-Appellees.

UNPUBLISHED

January 16, 2001

No. 217178

Macomb Circuit Court

LC No. 96-005055-NH

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) because the statute of limitations had expired. We affirm in part, reverse in part and remand. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

After Sosinski injured her feet, she consulted Dr. Trosin only once, on November 30, 1993. Between December 2, 1993, and January 6, 1994, she saw Dr. Emerick for the same injury. Both physicians failed to diagnose and treat what was a fracture of her heel. On January 18, 1994, Sosinski consulted another doctor, who finally told her she had a fracture and, had he seen her first, he would have put a cast on her foot. Sosinski testified at her deposition that this other doctor's statement led her to believe that Drs. Trosin and Emerick had done something wrong. Sosinski's attorney sent defendants notice of an intent to sue on November 27, 1995, and filed this action on June 21, 1996.

¹ Leonard Sosinski is presumably Mayo Sosinski's husband. The complaint does not specify the nature of his claims. Accordingly, while we refer to both as plaintiffs, we use Sosinski to refer to Mayo Sosinski.

* Circuit judge, sitting on the Court of Appeals by assignment.

In moving for summary disposition, the parties disputed how long the limitations period was tolled between the notice of intent and when Sosinski filed the complaint. Defendants contended it was tolled only for 154 days and thus the complaint was not timely filed. Sosinski contended it was tolled for 182 days and thus the complaint was timely filed. Defendants responded that the complaint was not tolled when the complaint was filed because it was not accompanied by the requisite affidavit of merit and when the affidavit was filed on July 19, 1996, it did not relate back to the filing of the complaint.

The trial court ruled that the two-year limitations period applied to plaintiffs' claim against Dr. Trosin and it would have expired on November 30, 1995. According to the trial court, this claim was tolled on November 27 when Sosinski sent her notice of intent and began to run again after 154 days (April 30, 1996) because Dr. Trosin had not responded to the letter. Because Sosinski had not filed her claim against Dr. Trosin by May 3, 1996, the trial court also ruled that her claim against Dr. Trosin was barred. The trial court ruled that the two-year limitations period applied to plaintiffs' claim against Dr. Emerick and it would have expired on January 6, 1996. According to the trial court, this claim was tolled on November 27 when Sosinski sent her notice of intent and began to run again after 154 days (April 30, 1996) because Dr. Emerick had not responded to the letter. Because plaintiff had not filed her claim against Dr. Emerick by June 10, 1996, the trial court ruled that her claim against Dr. Emerick was barred.

II. Applying The Statute Of Limitations

A. Standard Of Review

We review de novo whether the statute of limitations barred Sosinski's claims.²

B. Statutory Provisions

The limitations period for a malpractice claim is two years from the time the claim accrues.³ A medical malpractice claim accrues at the time of the act or omission that gave rise to the claim "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."⁴ Because Sosinski discovered her claim within the two-year limitations period, the six-month discovery period provided under MCL 600.5838a(2); MSA 27A.5838(1)(2) is not relevant.

C. The Claim Against Dr. Trosin

Sosinski last treated with Dr. Trosin on November 30, 1993, and her claim against her accrued at that time. Before Sosinski could file suit, she was required to give 182 days' notice of her intent to do so.⁵ Sosinski gave the requisite notice on November 27, 1995. Pursuant to MCL

² *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

³ MCL 600.5805(1), (5); MSA 27A.5805(1), (5).

⁴ MCL 600.5838a(1); MSA 27A.5838(1)(1).

⁵ MCL 600.2912b(1); MSA 27A.2912(2)(1).

600.5856(d); MSA 27A.5856(d), the limitations period was tolled for the next 182-day period,⁶ or from November 27, 1995 through May 27, 1996. Therefore, the trial court erred when it ruled that the limitation period was tolled only for the 154-day “no suit” period provided by MCL 600.2912b(8); MSA 27A.2912(2)(8).⁷ However, when the limitations period began to run again on May 28, 1996, there were only four days left in the two-year period of limitations. That period expired on May 31, 1996, well before Sosinski filed her complaint. Therefore, the trial court did not err in ruling that the claim against Dr. Trosin was time-barred.

D. The Claim Against Dr. Emerick

Sosinski last treated with Dr. Emerick on January 6, 1994, and her claim against him accrued at that time. When the limitations period began to run again on May 28, 1996, there were forty-one days left in that two-year period. That period would have expired on July 7, 1996, but because that day was a Sunday, the period was extended to July 8, 1996.⁸ Regardless, the remainder of the two-year limitations period had not expired before Sosinski filed her complaint. In this case, however, filing the complaint did not toll the limitations period because Sosinski neglected to file the affidavit of merit as required under MCL 600.2912d(1); MSA 27A.2912(4)(1).⁹ Pursuant to MCL 600.2912d(3); MSA 27A.2912(4)(3), on July 3, 1996, Sosinski filed a motion for an additional twenty-eight days in which to file the affidavit, thereby tolling the limitations period again.¹⁰ Because Sosinski filed the affidavit before that twenty-eight-day period expired, her claim against Dr. Emerick was not time-barred and the trial court erred in concluding otherwise.¹¹

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

⁶ *Omelenchuk v City of Warren*, 461 Mich 567, 575-577; 609 NW2d 177 (2000).

⁷ *Id.*

⁸ MCR 1.108.

⁹ *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998), *aff’d* 461 Mich 547 (2000).

¹⁰ *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997); *Scarsella*, *supra* at 64-65.

¹¹ We decline to consider defendants’ claim that the trial court erred in granting the motion for additional time because defendants failed to preserve the issue by filing a cross-appeal. *Shipman v Fontaine Truck Equip Co*, 184 Mich App 706, 714; 459 NW2d 30 (1990); *Lamson v Martin*, 182 Mich App 233, 237; 451 NW2d 601 (1990).